Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-794

EDWARD WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

EDWARD WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The petitioner, Edward Washington, respectfully requests that a writ of certiorari be issued to review the judgment and order of the District of Columbia Court of Appeals.

OPINIONS BELOW

On February 28, 1977, a jury found petitioner guilty of rape and robbery. He was sentenced to ten to 30 years on April 11, 1977 by the Honorable Eugene Hamilton of the Superior Court of the District of Columbia.

On July 25, 1978, the District of Columbia Court of Appeals issued a 13-page opinion (Appendix C) denying petitioner's appeal. He is presently confined at the Lorton Reformatory in Virginia.

JURISDICTION

This Court has jurisdiction despite the failure of petitioner to file within the prescribed ninety days pursuant to *Schacht v. United States*, 394 U.S. 58, 63; see also *Heflin v. United States*, 358 U.S. 415, p. 418 (n.7) and because petitioner herein concedes that there is nothing left to be tried in any further proceedings. See *Mills v. Alabama*, 384 U.S. 214; 28 U.S.C. §1257.

The petition was not filed within 90 days because petitioner lacked the funds to pay printing costs. His mother has accumulated said funds over the past 90 days.

QUESTION PRESENTED

Did the Court's treatment of the jury notes breach the rules and cause a reversal?

STATEMENT OF FACTS

A. The Prosecution's Case:

Sheileta Newman is a twenty-five year old female who lived with her boyfriend, Eugene Davis, on January 23, 1976. Their last alleged sexual involvement prior to January 23rd was some three days before. (Tr. 11) Ms. Newman was a bit behind schedule for work and left her apartment hurriedly at about 8:10 A.M. on Friday morning, January 23, 1976. There was a car parked out front with two strangers in it. After passing the vehicle two men approached her from the rear, stuck an object into her back, ordered her into the car and drove away. (Tr. I 11-13).[1] Ms. Newman

[1] Tr. I refers to the court proceedings of February 28, 1977, beginning at 11:05 A.M. and totaling 105 pages.

testified that despite much fear, tears and anxiety she had enough presence of mind to recall the following:

> The car had an LTD insignia on the dashboard and in the rear view window. It was green. The car had red over white tags. The driver used an open wrench to start the car. We traveled right onto Sourthern Avenue and right onto Wheeler Road and left on Valley Avenue and to Atlantic Street to South Capitol Street. From there to the freeway, "295 or something" past the Pennsylvania Avenue and off at the Dean Avenue Exit. Next we went left to Mayfair Gardens at a no [entry] sign and through the part to Kenilworth Dump by a bike path. (Tr. I 14-16)

During the trip to the dump the passenger talked a great deal to Ms. Newman about college, the military and other matters. She saw his face as he would turn and talk. She saw the driver through the rear view mirror. As a former student in art Ms. Newman tried to remember details of her assailant's faces. (Tr. I 18-20)

Upon stopping at the dump a gun was pointed at Ms. Newman and the rape began. The driver was the first to force sex and then the passenger. Both sexual acts were face to face just inches apart. (Tr. I 24) During the sexual act by the driver a checkbook with the name Ronald M. was left momentarily on the back seat. After its discovery it was removed. The driver was identified in court as Michael Smith and the passenger was identified as petitioner Washington. The passenger took 40¢ from Ms. Newman after the sexual act. (Tr. I 30)

> The passenger [Washington] was described as a heavy, 185 pound, full-faced black man with a natural haircut, reddish brown in color. There was a heavy mustache and no beard. (Tr. I 33)

A first photograph selected as a look alike of the passenger [Washington] came upon the viewing of some 350 slides. (Tr. II, 11) The description by the witness was the man looked 70% like the rapist. Said photograph was not a photograph of petitioner. (Tr. I, 36-44) In late March 1976, Ms. Newman picked peititioner Washington from a line-up as the passenger. (Tr. I, 53) The prosecutor then put into evidenc the fact that immediately prior to trial in the courthouse corridor Ms. Newman saw petitioner and became scared and asked the detective what he was doing "walking around." (Tr. I, 54)

B. Petitioner Washington's Case:

The defense for petitioner consumed from Tr. III, pp. 85-302. It was a presentation of a detailed and corroborated alibi.

Ronald Coward is a barber who has trimmed petitioner's beard and cut his hair every three weeks for the four years up to and through the trial. At no time during said time did petitioner have just a mustache with no beard (as described by the complainant), reddish-brown hair (as described by the complainant) or a bush or hair 2 to 4 inches in length from the scalp (as described by the complainant). (Tr. III, 86-88)

Richard F. West is the assistant Vice-President of Surburban Trust Company and on January 23, 1976, he was branch manager of the Seat Pleasant Branch. That day three checks were cashed "probably before 9 A.M. and certainly before 9:30 A.M." Those checks carried the names of Washington, McLyndon and Ford. They had been cashed that day at Pleasant Liquors. (Tr. III, 109-112) The prosecutor tried to use the grand jury minutes to riddle the defense witness regarding the checks which were in evidence as defense exhibits 1, 2

and 3. (Tr. III, 114-117) Mr. West testified that the bank records indicated to him "beyond any reasonable doubt that the checks were cashed before 9:30 A.M. on January 23, 1976. (Tr. III, 117)

Warren S. Lewis was an employee at Pleasant Liquors on January 23, 1976, and he cashed the checks identified as defense exhibits 1, 2 and 3. (Tr. III 126-128) He knew petitioner and has never seen him with co-defendant Smith before. (Tr. III, 131)

Charles McLyndon testified that on January 23, 1976, he, Mr. Ford and petitioner received their paychecks and cashed them between 8:30 A.M. and 9 A.M. at Pleasant Liquors. Said time is when the rape was occurring at the Kenilworth dump. Mr. McLyndon was with petitioner at all times between 8 - 10 A.M. Petitioner has always had a beard and no reddish-brown hair in the seven years Mr. McLyndon knew him. (Tr. III, 140-150)

Mr. Ford confirmed what Mr. McLyndon had testified about and expanded upon it by testifying that petitioner and he had been at the track, *i.e.* Bowie, Maryland, from about 1:45 P.M. till 5 P.M. on January 23, 1976. Earlier they had cashed the checks at the time and in the manner that Mr. McLyndon had stated earlier. (Tr. III, 179-187) Mr. Ford even placed petitioner in the barber shop getting his beard trimmed after they had cashed their checks and prior to going to Bowie.

Gloria D. Ford testified that she knows petitioner and is married to Kenneth Ford. Peltitioner has never had reddish-brown hair and has always had a beard. The checks were cashed as other witnesses had earlier testified. (Tr. III, 248-255)

Petitioner testified that he had been paid on Friday morning, January 23rd in a manner and at a time earlier described by three other witnesses. He never has worn plats in his hair as the complainant had described him as wearing; his hair was not and never has been reddish-brown; there has been a beard at all times except when cut back a bit after a poor trimming when drinking; and he has never known the co-defendant except through being charged with him. He had been paid $369.00 before 8:30 A.M. On January 23, 1976, and had cashed the check per the bank and liquor store witnesses and records before 9 A.M. that day. He had no motive to rob Ms. Newman of 40¢ between 8:30 - 9 A.M. that day at a dump and was not there (Tr. III, 269-284).

ARGUMENT

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO DECLARE A MISTRIAL UPON LEARNING OF THE SPLIT IN HOW THE JURY STOOD MIDWAY THROUGH DELIBERATIONS AND COMPOUNDED THAT ERROR WHEN IT SUBSEQUENTLY COMMUNICATED WITH THE JURY WITHOUT NOTIFYING EITHER APPELLANT OR THEIR COUNSEL. (Tr. III, 500-01, 508-512)

During the first day of jury deliberations, at 2:56 P.M., the trial court advised counsel as follows:

> THE COURT: Now, I have received a communication from the jury and this note has not been read by me. It has not been read by me because of its length. I suspected that it might contain some information which was inappropriate. Now, I had a law student to read it who has nothing to do with this case. I asked her to please read this and to tell me whether the jury has mentioned anything about

> their division. That is, any thing about the number for guilty or not guilty and I am informed that it does and so therefore, I am returning that note to the jury. It will be returned with the following communication, "This note has not been read. I did not read it because of its obvious length. I have asked someone to read it and I have been informed that you have mentioned your *number in this note.* You may not do that again at any time. *You may send me a note that does not contain any information about your number.*" I am sending it back to the jury.
>
> Thank you, gentlemen. (Tr. III, 500)

Two hours later the jury was excused for the day. Unknown to any defense party was the fact that a second note had been received from the jury indicating that they could not reach a unanimous verdict. (Tr. III, 501) The jury returned the next day, March 8, 1977, and reached a verdict at 12:46 P.M. that afternoon. Counsel were never notified pre-verdict of the second note. One of the defense attorneys tried to make a motion before the verdict was announced and the court refused to hear it then. (Tr. III, 504) At the bench following the verdict the defense questioned the propriety of the procedure used by the court on the second note. Thereupon, the court stated:

> "Now, Mr. Kohlman, the matter to which you refer was a note from the jury. As you know, sir, I sent the first note back and I did not read it. They subsequently at four o'clock yesterday afternoon sent a note that the jury was unable to make a unanimous decision. After which, of course, they were sent home yesterday afternoon. (Tr. III, 508)

The defense then made clear that it had wanted a mistrial due to the first note, *i.e.* how the jury was split, and would have similarly moved on the second note had they known of it. (Tr. III, 509) The court advised counsel that nothing improper had been done and that the notes–still not made available to petitioner–were a part of the record for appeal. (Tr. III, 509-512)

Rule 43, *Superior Court Rules of Criminal Procedure*, and Rule 43, *F.R.Cr.P.*, expressly give the accused an absolute right to presence at all stages of a case against him. Said right remains while the jury deliberates and when communications occur between the Court and the jury. *Rogers v. United States*, 422 U.S. 35 (1975). In *Rogers, supra* the Court reversed despite the fact that the issue had not even been raised in the 5th Circuit Court of Appeals. The reversal was based on the fact that the trial court exchanged notes with *the jury in the absence of counsel* and the defendant.

What happened in the instant case caused the judgment to be filled with error. Despite the fact that the trial court mentioned that no warning had been given in the jury instructions regarding the prohibition against the jury revealing how it stood numerically on the verdict (Tr. III, 511), there can be no denying by the trial judge nor any other Superior Court Judge that Instruction §2.72 in the *Standard Jury Instructions* book is given in almost every case by the judge without a request by either the prosecution or the defense. It is elementary and it states, in pertinent part, that:

> Bear in mind also that you are never to reveal to *any* person–not even the court–how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached a unanimous verdict.

The trial judge in this case was obviously aware of said prohibition when he had his law clerk read the note and report to the court the gist of its contents.

Of course one mystery remains. How could the judge suspect, as he said he did, a numerical revelation and order the law clerk to read the note without the court having spontaneously read the note upon the receipt thereof and then seen the problem and stopped reading? It is ancient law that any questioning of jurors as to the numerical division requires a reversal. *U.S. v. Cheramie*, 520 F.2d 325 (5th Cir. 1975). The very purpose behind criticisms of the *Allen* charge and of *anyone* learning of the numerical split within the jury room is that unfair pressure may thus be applied, deliberately or not, to a dissenting number of jurors and justice may crumble. Nonetheless, a judge is more than a "robed mummy," *U.S. v. Cheramie, supra*, at 329. *He must have some discretion and utilize it* fairly. A fine balancing act is thus required of all judges. The problem in this case is that the court knew of the split–either through its clerk or after having personally read the note–and told the jury to keep deliberating and not tell the court of its numerical count until unanimous. Said response caused pressure on the juror(s) in the minority and that fact is reflected by the second note, some 1½ hours later, which stated that the jury was hung. The court used extraordinarily unfair judgment at that point. Armed with the fact that the deliberations were already tainted by the first note, the court deliberately neglected to summons the defense upon receipt of the second note. The only reason why the court would do as it did was to avoid a mistrial. That is an admission of error by the trial court. Of course petitioners have not had access to either note and do not know precisely what is in either

note. If the first note showed a majority for guilty there is no question that each petitioner would have moved for a mistrial as the courts have recognized that even a "report [that] a jury is deadlocked could be welcome news to an accused who is fearful of his fate." *U.S. v. Beckerman*, 516 F.2d 905, 909 (2d Cir. 1975).

In *Quarles v. U.S.*, 349 A.2d 690 (1975), the court refused to apply *Rogers, supra*, because the court determined that the mere transmission of certain exhibits to the jury upon request without notice to the accused does not constitute a "communication." That ruling makes sense. Surely, the logical escape hatch from error in *Quarles, supra*, is not available here.

It is unclear whether the court sent a written response to jury note number two or whether the jury was simply sent home without explanation.

We do know that after the jury announced it was hung and the court sealed the note, the jury was sent home immediately and the court told no one. The effect of the unrequested recess for the night coupled to the 1½ hour earlier revealed numerical standing served as a judicial scolding for the minority juror(s) who were still clinging to a vote(s) of not guilty. Like children without an explanation the jury was sent home after its announcement of being hung.

In *U.S. v. Schor*, 418 F.2d 26 (2d Cir. 1969), the judge was reversed because he answered a jury note without the defendant or counsel being present. There can be no doubt that the action of the trial judge here in sending the jury home with or without explanation served as a firm answer to an unwelcomed note. Please see, Devitt and Blackman, *Federal Jury Practice and Instructions*, §18.12, Vol. I, p. 599, 1977 ed. The reasoning in *Schor, supra*, was that communications betweens the court and jury after the jury has retired to deliberate should be given in a proper atmosphere where counsel can participate for the accused. That right was denied petitioner. The court added at 30 in *Schor, supra*, that "any presumption of prejudice resulting from the error of communicating with the jury in the absence of the defendant and his counsel was *a rebuttable one.*" Also, *Rice v. U.S.*, 356 F.2d 709, 716-717 (8th Cir. 1966). Therefore, the presumption is prejudice and not harmless error and the government must now overcome that presumption.

It can hardly be said that the issue(s) raised here is not of great significance. Communciations between the jury and anyone after it retires to deliberate is so protected that this Court reversed in *Rogers, supra*, where the issue had never even been raised on appeal previously. The violation of appellant's rights here stems from his right to due process under the 5th and 6th Amendments to the United States Constitution[2] and Rule 43, *F.R.Cr.P.* and *Superior Court Rules of Criminal Procedure.* In fact the court held in *U.S. v. Glick*, 463, F.2d 491 (2d Cir. 1972) that notes exchanged between court and jury absent counsel and/or client violate the mandate of Rule 43. Preservation of an accused's right to presence throughout the entire process and opportunity to protect the record and prevent the court from intimidating a minority number of jurors should be scrupulously observed by a trial judge. *U.S. v. Arriagade*, 451 F.2d 487 (4th Cir.. 1971); *cert. denied*, 405 U.S. 1018 (1972). There was no such observation of fair play and compliance with the law in this case.

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[2] *Quarles, supra.*

It was grounds for a mistrial when the numerical split was discovered by the court and that coupled to the second note and counsel being left totaly uniformed eroded what little buffer as had remained between a fair and an unfair rendering of a verdict in this case.

CONCLUSION

Wherefore, it is respectfully requested that the instant Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

No.

EDWARD WASHINGTON, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

AFFIDAVIT OF PETITIONER FOR WRIT OF CERTIORARI

District of Columbia: ss.:

DISTRICT OF COLUMBIA) ss.:

I, Edward Washington, do hereby attest and swear that the petition for writ of certiorari filed this day by my counsel in the Supreme Court for the United States of America is filed in good faith and with the firm belief that the issues raised by counsel are issues which should necessitate a reversal of my present conviction before the Superior Court of the District of Columbia.

/s/ Edward Washington

APPENDIX B

AFFIDAVIT OF PETITIONER'S COUNSEL

I, Kenneth Michael Robinson, hereby attest and swear that I am filing this Petition in good faith.

/s/ Kenneth Michael Robinson
Kenneth Michael Robinson

Subscribed and sworn to before me this 1st day of November, 1978.

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12173

MICHAEL M. SMITH, APPELLANT,

v.

UNITED STATES, APPELLEE.

No. 12426

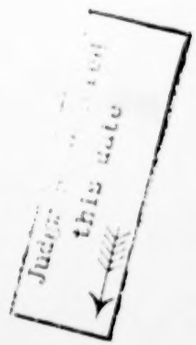
EDWARD M. WASHINGTON, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeals from the Superior Court of the District of Columbia

(Hon. Eugene N. Hamilton, Trial Judge)



(Argued May 9, 1978 Decided July 25, 1978)

David T. Austern for appellant Smith.

Kenneth M. Robinson for appellant Washington.

Michael L. Lehr, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *Joseph B. Valder*, Assistant United States Attorneys, were on the brief, for appellee.

[1783]

Before KERN, YEAGLEY and HARRIS, *Associate Judges.*

PER CURIAM: This case arose from the abduction and rape of a young woman on the morning of January 23, 1976. As she left her apartment to catch a bus to work, two men forced her into a car and drove to the Kenilworth Landfill where both of the men raped her at gunpoint and took forty cents from her purse. Subsequently, both appellants were found guilty by a jury of armed kidnaping,[1] armed rape,[2] armed robbery,[3] and carrying a pistol without a license.[4] On appeal, appellant Smith alleges that the trial court committed reversible error (1) in excluding expert testimony on the psychological principles underlying eyewitness identification and expert testimony concerning a polygraph examination; and (2) in failing to admit direct evidence at trial tending to incriminate another person who looked like appellant Smith. Appellant Washington argues that his motion for judgment of acquittal should have been granted.[5]

[1] D.C. Code 1973, §§ 22-2101, -3202.

[2] D.C. Code 1973, §§ 22-2801, -3202.

[3] D.C. Code 1973, §§ 22-2901, -3202.

[4] D.C. Code 1973, § 22-3204.

[5] The trial court may not enter a judgment of acquittal if the evidence produced at trial is such that a reasonable juror could fairly conclude beyond a reasonable doubt that the defendant was guilty. *(James) Williams v. United States*, D.C.App., 357 A.2d 865, 867 (1976). Where, as in this case, the finding of guilt rests upon the positive identification of a single eyewitness, the standard is that so long as a reasonable juror could find the circumstances surrounding the identification to be convincing beyond a reasonable doubt, the case must be submitted to the jury. *See Berryman v. United States*, D.C.App., 378 A.2d 1317, 1321 (1977); *Graham v. United States*, D.C.App., 377 A.2d 1138, 1141 (1977). Furthermore, in assessing the sufficiency of the evidence, the appellate court

Both appellants contend that the trial court improperly communicated with the jury outside the presence of appellants or their attorneys. We affirm the convictions.

It is well established that a "trial judge has broad discretion in the matter of the admission or exclusion of

must review the record in the light most favorable to the government, making allowance for the right of the jury to determine the credibility of the witnesses and to draw justifiable inferences from their testimony. *Franey v. United States*, D.C.App., 382 A.2d 1019, 1022 (1978).

We find ample evidence in the record to support submission of this case to the jury. The complainant, who had training as a portrait artist, had a good opportunity to observe appellant Washington at close range both during the rape and prior to it, for while she was being driven to the landfill appellant Washington was in the passenger seat and turned to face her when talking to her.

He argues, however, that descriptions of the passenger given by the complainant did not fit him. This contention is frivolous. He alleges that she once stated that the passenger, unlike himself, had reddish-brown hair, yet the complainant's testimony directly contradicts this assertion. Moreover, although she stated that the passenger did not have a beard and he testified that he had worn a beard for several years, there is no real inconsistency since the complainant stated that at the time of the rape the passenger had a couple of days' stubble from not shaving, and appellant Washington subsequently characterized such stubble as a "beard." Furthermore, the complainant twice identified appellant Washington from photographic arrays (once tentatively and once positively), she selected him from a police lineup, she spontaneously identified him as one of her abductors when she saw him in a courthouse hallway prior to a pretrial suppression hearing (both appellants were at that time free on their own recognizance), and she identified him at trial. Such identification testimony was sufficient for the jury reasonably to conclude that the defendant was one of her assailants. *See (Nathan) Williams v. United States*, D.C.App., 355 A.2d 784, 786 (1976).

expert evidence, and his action is to be sustained unless manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962). In this case, the trial court refused to permit appellant Smith to introduce expert testimony on the psychology of memory and perception. This court recently considered the issue of testimony by a psychologist concerning eyewitness identification and concluded that the subject matter of such testimony is not "beyond the ken of the average layman," nor would it "aid the trier in a search for the truth." *Dyas v. United States*, D.C.App., 376 A.2d 827, 832, *cert. denied*, —— U.S. ——, 98 S.Ct. 529 (1977). Because the subject matter of the testimony proffered in the present case is similar to the evidence offered there, *Dyas* controls this case and the evidence was properly excluded.[6] Moreover, we note that here, as in *Dyas*, trial counsel had ample opportunity to test the reliability of the complainant's identification through vigorous cross-examination. *Id.* at 832.

Similarly, the trial court did not abuse its discretion in refusing to admit testimony by an examiner concerning the results of a polygraph examination of appellant. Because of the authoritative quality which surrounds expert opinion, courts must reject testimony which might be given undue deference by jurors and which could thereby usurp the truthseeking function of the jury. *See Douglas v. United States*, D.C.App., 386 A.2d 289, 295 (1978); *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973). Consequently, the results of polygraph examinations are inadmissible. *See United States v. Alexander*,

[6] Although the trial court in the present case did not hold an evidentiary hearing to ascertain the content of the desired testimony as had occurred in *Dyas*, the substance of the proffered testimony was sufficiently presented in pretrial motions for the judge to make an informed ruling on the issues.

526 F.2d 161, 168 (8th Cir. 1975); *United States v. Skeens*, 161 U.S.App.D.C. 131, 134, 494 F.2d 1050, 1053 (1974); *Frye v. United States*, 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923). The trial court therefore did not abuse its discretion in excluding the expert testimony proffered at trial by appellant Smith.

Appellant Smith also contends that the trial court committed reversible error in failing to admit *direct* evidence which tended to incriminate a person who had been convicted of a previous rape and who looked somewhat like appellant. He argues that such evidence is admissible "when it tends to show that someone similar in appearance to defendant was perpetuating criminal activity similar to the charges at trial." *United States v. Hallman*, 142 U.SApp.D.C. 93, 95, 439 F.2d 603, 605 (1971).

The complainant testified that after she had been raped by the driver, she noticed a green checkbook beside her on the seat. She thought that it might help her identify her assailants, and so she tried to hide it under her coat. As she did so, she observed the name "Ronald M," but she was unable to determine whether the "M" was a middle initial or the first letter of a last name. She did not get a further look at the checkbook because the passenger discovered it when he got into the back seat to rape her, and he placed it in his pocket after upbraiding the driver for "leaving things behind." All of the preceding testimony was presented to the jury. In addition, the parties entered into a stipulation, which was read to the jury, to the effect that a person named Ronald Malcolm had been convicted of a rape which had occurred in the District of Columbia on December 17, 1975, approximately five weeks prior to the present incident, and that Malcolm had been in the city six days after complainant

had been raped. Moreover, photographs of both Malcolm and appellant were available for the jury to make comparisons of their features. Nevertheless, appellant Smith contends that these measures were inadequate, and that the trial court should have admitted testimony by one of the women who had been raped by Malcolm in December 1975, which would have allegedly revealed certain similarities between the two incidents. Following a hearing outside the presence of the jury at which one of the victims of the December rape testified, the trial court found, however, that there were *not* "sufficient similarities between the incidents . . . to permit a detailed reference to the matter involving [the rape of which Ronald Malcolm had been found guilty]."

Once a trial judge has determined whether the proffered evidence is relevant, and once he has weighed the probative value of that evidence against its potentially prejudicial impact, his judgment will not be overturned unless he has abused his discretion. *Punch v. United States*, D.C.App., 377 A.2d 1353, 1358 (1977). A careful review of the record reveals no abuse of discretion in the present case. Although there were certain similarities in the two events—an abduction by car of women from a public street and conversation between the assailants concerning whether they should take the victims to the "usual place"—there were far more significant *differences* between the two cases. In this case, a single victim was abducted by two men in a green Ford LTD who took her to a landfill and raped her at gunpoint, after which they rifled her purse and took 40 cents, in an incident which lasted, in its entirety, less than an hour. In the incident for which Ronald Malcolm was convicted, two women were abducted by four men in a brown Ford Galaxie 500 and were taken to an apartment where a fifth man waited; there, in an incident which lasted over

four hours, they were raped by all five men but they were not robbed, and although one of the men talked about having a gun, the victims never saw a weapon. On these facts, the trial court correctly concluded that "there is nothing particularly identifying as far as these two incidents are concerned as to lead one to the reasonable conclusion that the persons involved in one are reasonably likely to be involved in the other." Furthermore, it is relevant to note that the complainant in this case selected appellant as her assailant from a lineup in which both appellant and Ronald Malcolm were present.

Appellants contend, finally, that the trial court improperly communicated with the jury without notifying either appellants or their counsel. The record reveals that the jury began deliberating late in the afternoon of Friday, March 4, 1977, after five days of trial. On Monday, March 7, the second day of deliberation, the court received two notes from the jury. At approximately 3 p.m. that day the judge informed counsel that he had received a lengthy note from the jury, but that he had not read it because he suspected that it might contain inappropriate information. He advised counsel that he had, however, asked a law student who had no connection with the case to read it, and that the note revealed the numerical division of the jury at that time.[7] The court therefore was returning the note to the jury with the following communication:

> This note has not been read. I did not read it because of its obvious length. I have asked some-

[7] The jury's inadvertent revelation of its numerical division, without inquiry from the court, did not provide automatic grounds for a mistrial. *Compare Jackson v. United States*, D.C.App., 368 A.2d 1140, 1143 (1977), with *United States v. Diggs*, 173 U.S.App.D.C. 95, 107, 522 F.2d 1310, 1322 (1975), *cert. denied*, 429 U.S. 852 (1976).

> one to read it and have been informed that you have mentioned your number in this note. You may not do that again at any time. You may send me a note that does not contain any information about your number.

About an hour later, at approximately 4 p.m., the court received a second note indicating that the jury was unable to reach a unanimous decision. The judge did not respond to this note; instead, without informing appellants or their counsel of this second communication, the court shortly thereafter excused the jury until the next morning.

At 12:47 p.m. the following day the jury returned a verdict of guilty and, after being polled, was excused. At that time the court informed counsel of the second note from the jury. He explained his reasons for not earlier informing counsel of this communication as follows:

> [It] was simply a note which said that they were unable to reach a unanimous decision which told me absolutely nothing. I know that that is the case as long as they have not returned a verdict. They did not at all indicate that they were deadlocked. They simply informed me that at that time they had not been able to reach a unanimous verdict which as I said, it told me nothing that I didn't already know. . . .

A defendant and his counsel have a right to be informed of all communications from the jury and to offer their reactions before the trial judge undertakes to respond. *Rogers v. United States*, 422 U.S. 35, 39 (1975). *See Shields v. United States*, 273 U.S. 583, 587-88 (1927); Super. Ct. Cr. R. 43. In the present case, of course, the trial judge made no response at all to the second note

from the jury around 4 p.m. indicating they had not reached a unanimous verdict. Appellants therefore cannot argue that the trial court erred by communicating with the jury without notifying them; instead, they are asking us, in effect, to consider the judge's failure to respond, in combination with his subsequent excusing of the jury for the night, to have amounted to a communication from the court which improperly pressured the jury to reach agreement. Particularly in light of the judge's comment that the note did *not* indicate that the jury was deadlocked, but merely that they had not yet reached a verdict, it is speculative to interpret the jury's note as tantamount to a request for additional instructions. *Cf. United States v. Schor*, 418 F.2d 26, 29-30 (2d Cir. 1969). Nevertheless, because of the ambiguity created by the court's procedure in this case, we will assume arguendo that the jurors could have interpreted the court's reaction as an implicit instruction to continue their deliberations.

Despite the importance of the right of an accused person to be present at every stage of the trial, a failure to comply with Rule 43 does not require automatic reversal and may in the proper circumstances be harmless error. *Rogers v. United States*, *supra* at 40; *United States v. Diggs*, 173 U.S.App.D.C. 95, 104, 522 F.2d 1310, 1319 (1975), *cert. denied*, 429 U.S. 852 (1976). Consequently, we look at the facts of the present case to determine whether appellants suffered any prejudice from the trial court's failure to inform them of the second jury note. *See United States v. Schor*, *supra* at 30; *Walker v. United States*, 116 U.S.App.D.C. 221, 222, 322 F.2d at 434, 435 (1963).

All parties here were aware from the first note (and from the fact that the jury had not yet returned a verdict) that there was in fact no unanimity among the

jurors at 3 p.m. on March 7. This alone would not have been unusual, for the trial had been long and fairly complex. When the jury communicated with the judge at about 4 p.m., the court did not respond to their note but instead, shortly thereafter, excused the jury for the day. Although the jury indicated merely that they had not yet reached unanimity, we note that if at this stage a deadlock had been apparent, an appropriate supplemental jury instruction would have been permissible. *Winters v. United States*, D.C.App., 317 A.2d 530, 532-34 (1974) (en banc). The next morning when the jury returned, they deliberated for several more hours before reaching a decision. Under the particular circumstances of this case, we cannot say that the neutral actions of the trial judge, who made no direct response to a jury note which did *not* reveal a deadlock but instead excused the jury at day's end, had the effect of coercing the jury into rendering a verdict which they were reluctant to return. *See Jenkins v. United States*, 380 U.S. 445, 446 (1965); *Winters v. United States*, *supra* at 532. Therefore the trial court's actions in this case did not prejudice the appellants,[8] and the convictions are

Affirmed.

[8] Appellant Smith contended at trial (in an argument which appellant Washington joins on appeal) that they were prejudiced by the failure of the court to inform them of the second note until after the verdict because such knowledge would have "re-enforced what my intentions were this morning," namely, to move for a mistrial, "based on both the length of the deliberations by the jury and the fact that contrary to the specific instructions of this Court, the jury had sent to this Court information indicating not only that they were unable to reach a verdict but an actual division." Defense counsel failed, however, to act on these intentions. In light of the fact that defense counsel admitted that in his own mind there were sufficient grounds to request a mistrial "even without the knowledge" of the second note, and counsel's failure nonetheless to make the motion, it would be speculation on our part to assume that counsel would have acted any differently if he had possessed knowledge of the second note. Moreover, the trial court explicitly stated that "in a case which has consumed as much time as this case did," the court would have refused to grant a mistrial if the motion has been made on these grounds. Given the length of the trial in this case, and given the fact that the jury's inadvertent revelation of its numerical division would not in this case have provided grounds for a mistrial, *see* note 7, *infra*, it was well within the trial court's broad discretion to have so ruled. *See Illinois v. Somerville*, 410 U.S. 458, 462 (1973); *Hammond v. United States*, D.C.App., 345 A.2d 140, 141 (1973).